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IN THE

Supreme Court of the United States

October Term, 1966

No. 1244

EDDIE ROCCO,

Petitioner,

vs.

LIFE MAGAZINE, TIME, INC., MIKE DURHAM, et al.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California and the District Court of Appeal, Second Appellate District, Division One.

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Petitioner Pro Se.

Jeffries Banknote Company, Los Angeles — MA 7-9514

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LIFE MAGAZINE, TIME, INC., MIKE DURHAM, et al.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California and the District Court of Appeal, Second Appellate District, Division One.

Eddie Rocco prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Second Appellate District, Division One, entered in above case November 22, 1966 and of the Supreme Court of California entered January 20, 1967.

Opinions Below

No written opinions were filed by either court. Minutes of the District Court of Appeal are printed in Appendix A hereto. Order of the California Supreme Court, denying hearing, is printed in Appendix A hereto. District Court granted respondents' motion to dismiss appeal and denied petitioner's request to be relieved of default. California Supreme Court denied petition for hearing.

Jurisdiction

The District Court of Appeal entered judgment in this case on November 22, 1966. The Supreme Court of California denied petition for hearing on January 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) since a right has been especially set up and claimed under the Constitution of the United States.

Question Presented

The sole question presented is whether a litigant can be denied the right to appellate review in the State of California, which does provide a system of appellate review.

Constitutional Provision Involved

The constitutional provision involved is that of the Fourteenth Amendment to the United States Constitution, which provides:

> ". . . nor shall any state deprive any person of ..... property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

In a civil action, in Los Angeles Superior Court, for wrongful conversion of his property, namely negatives of photos of Jack Ruby, the court ordered judgment for the defendants.

Notice of appeal was filed January 31, 1966. Cost of transcripts was estimated at $988.30. Because petitioner did not have funds, his attorney filed a Motion For Waiver Of Prepayment Of Transcript Fees. Motion was denied April 1, 1966.

Petitioner's attorneys withdrew and petitioner, without funds for other attorneys, in pro per, moved the Dis-

trict Court of Appeal for a Motion For Waiver Of Prepayment Of Transcript Fees. On June 20, 1966, said motion was denied.

On June 30, 1966, petitioner petitioned the California Supreme Court for a hearing. Said petition was denied on August 17, 1966.

Petitioner began preparing, through the study of Supreme Court practice, to petition this Court for certiorari.

About October 18, 1966, petitioner was served a Notice Of Motion To Dismiss Appeal, to be heard in the District Court of Appeal. This was served when the 90 day period, for petitioning this Court for certiorari, was still running.

About during the first week in November, petitioner, finding himself in possession of funds for the transcripts and an attorney, through an attorney, asked respondents to allow petitioner to purchase transcripts and proceed with the appeal. The 90 day period was still running. Respondents refused.

Thereupon, petitioner filed an answer to Motion To Dismiss and asked the court for relief from default and to allow five days for the purchase of transcripts. The court denied requests and granted Motion To Dismiss on November 22, 1966.

On January 3, 1967, petitioner filed a petition for hearing in the California Supreme Court, which was denied, without opinion, January 20, 1967.

The decision of the Court of Appeal was one of surprise and in which the federal issue was born and could only first be raised in appeal to the California Supreme Court. The federal question was timely raised and supports the exercise of Supreme Court jurisdiction.

When the Supreme Court denied petition for hearing, there was a final judgment by the highest court of the state in which a decision could be had.

"There can be but one final judgment in an action, and such final judgment is one which, in effect, ends the action in court in which it was entered . . ." *Crofoot v. Crofoot,* 283 P 2d 283.

A letter from the clerk of the Ohio Supreme Court, to a litigant, refusing to accept his appeal, because of failure to pay the filing fee, was ruled a "final judgment". ". . . delegation to the clerk of a matter involving no discretion clearly suffices to make the clerk's letter a final judgment of Ohio's highest court, as required by 28 U.S.C. § 1257." *Burns v. Ohio,* 360 U.S. 257.

How Federal Question Is Presented

The federal question was raised in the petition to the California Supreme Court, pages 9 & 10, and has been certified to this Court as a part of the record:

> "ARTICLE XIV, CONSTITUTION OF THE UNITED STATES, DOES NOT CONFINE DUE PROCESS AND EQUAL PROTECTION TO SELECTIVE CLASSES OF INDIVIDUALS.
>
> ". . . nor shall any state deprive any person of life, liberty or property, without DUE PROCESS of law; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.
>
> "DUE PROCESS of law and EQUAL PROTECTION of the laws are secured if the laws operate on all alike, *Duncan v. Missouri,* 152 U.S. 382, 14 Sup. Ct. 570, 38 L. Ed. 485.
>
> "Thus, this plaintiff has been denied resort to DUE PROCESS by the Court's denial of said plaintiff's

right to appellate review, first, because he did not have the money and, second, in spite of him having the money."

Reasons for Granting the Writ

"The right of an appeal must not be lightly forfeited, and where a doubt exists as to a litigant's conduct being contumacious or wilful, an appellate court will tolerate the acts which were disruptive of the judicial process. We always prefer to resolve a cause on its merits . . ." *Tobin v. Casaus,* 128 C.A.2d 588(4).

". . . in view of the appellant's efforts to obtain funds for a reporter's transcript, we do not regard the delay as flagrant . . ." *Jeffers v. Screen Extras Guild,* 140 C.A.2d 604; 295 P 2d 417. (P. 7. Calif. Supr. Ct. petition)

The cause, herein, represents a tremendously important principle and is of general interest. It is not a private controversy for it affects great masses of people whose hopes it is that the law shall not be of one variety for the rich and another for the poor.

The American Civil Liberties Union attorney told this petitioner that vast numbers of poor people are losing a tremendous amount of money in law suits because they cannot obtain the money for expensive transcripts.

The expensive transcript seems to be a gimmick by which to defeat meritorious causes. In this cause, the superior court was told the trial would take one day. When it finally went to trial it dragged into a fifth, thus setting up the expensive transcript, which petitioner could not buy immediately.

In activities, far beyond what the average litigant will do to obtain the transcript, petitioner talked with at least

30 attorneys. In every case, petitioner was told this case cannot proceed on anything less than the full transcripts.

Petitioner's attorneys would not proceed without the transcripts, in complete form. They felt the points, to be raised on appeal, cover a very wide range of the oral proceedings at the trial.

". . . and as the appeal is predicated upon the assertion that the evidence does not support the findings, it will be necessary for this court to have the reporter's transcript of all the evidence in the case." *Haskins v. Crumley,* 152 C.A.2d 64.

California Rules of Court

Rules On Appeal Rule 45(e) "The reviewing court for good causes may relieve a party from a default occasioned by any failure to comply with these rules. . . ." (P. 7. Calif. Supr. Ct. petition).

Petitioner was preparing to assert his federal rights by petitioning this Court to order California to pay for the necessary transcripts. Of course, California does not now have the funds for this purpose. There was the time when the states did not have funds with which to pay for transcripts for indigents, in criminal actions. Then came this Court's ruling in *Griffin v. Illinois,* 351 U.S. 13. Today, the states do have the funds.

Since time was still running for petitioner to exhaust his legal remedies, when the motion to dismiss was filed, there was a denial of due process and equal protection.

Petitioner acted in good faith, was not dilatory, and pursued every available means, when he did not have the money, to buy the transcripts. Once he had the money, he was denied the right to purchase transcripts and proceed with his appeal.

Conclusion

For the foregoing reasons, petitioner respectfully urges this Court to grant this petition for a writ of certiorari.

March 30, 1967.

EDDIE ROCCO
Petitioner Pro Se.

APPENDIX A

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE
NOVEMBER 22, 1966

Minutes

31113 Rocco vs Life Magazine, et al

Motion to dismiss appeal presented by Kendall R. Bishop and opposed by Eddie Rocco, appellant in pro per, who moved to be relieved from default. Motion to be relieved from default denied. Motion to dismiss granted; appeal dismissed. Fourt, J. deeming himself disqualified did not participate herein.

ORDER DUE
January 20, 1967

Order Denying Hearing After Judgment by the Court of Appeal

2nd District, Division 1, Civil No. 31113

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

ROCCO

v.

LIFE MAGAZINE ET AL

FILED
JAN. 18, 1967
William L. Sullivan,
Clerk

Appellant's petition for hearing DENIED.

TRAYNOR,
Chief Justice

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1244

EDDIE ROCCO,

Petitioner,

vs.

LIFE MAGAZINE, TIME, INC., MIKE DURHAM, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California and the District Court of Appeal, Second Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Time, Inc. and Mike Durham respectfully oppose the petition for a writ of certiorari on the ground that the petition presents no substantial federal question.

Opinions Below

On November 22, 1966 the California District Court of Appeal denied petitioner's request to be relieved from the default occasioned by his failure to pay timely for the reporter's and clerk's transcripts. The District Court of Appeal accordingly dismissed petitioner's appeal. The

California Supreme Court denied his petition for a hearing on January 20, 1967. No opinion was made by either court and neither ruling is reported.

Jurisdiction

Petition for a writ of certiorari was filed on April 7, 1967. The jurisdiction of this Court is sought to be invoked under Section 1257(3) of the Judicial Code [28 U.S.C. 1257(3)], but, as will appear from the argument which follows, the claimed federal right is not timely presented.

Question Presented

The sole question presented by the petition is whether California courts may dismiss an appeal when the appellant fails to perform acts prerequisite to its prosecution under the applicable rules of court.

Rules Involved

This case involves Rules 4, 5, 7, 10 and 45 of the California Rules of Court, adopted pursuant to Section 961 of the California Code of Civil Procedure. They are printed in Appendix A hereto.

Statement

Judgment in the Superior Court of the State of California for the County of Los Angeles was entered in favor of respondents and against petitioner on January 13, 1966. The court's Memorandum Opinion and the Findings of Fact and Conclusions of Law made in connection with said judgment are printed in Appendix B

hereto. Notice of appeal was filed January 31, 1966. Notice of the costs for preparation of the clerk's transcript was mailed to petitioner's attorney on March 9, 1966, and a letter estimating the cost for preparation of the reporter's transcript was mailed to petitioner's attorney on March 14, 1966. Petitioner at no time made arrangements for the payment of these costs.

On March 23, 1966, petitioner filed in the Superior Court a Motion for Order Dispensing with the Prepayment of Costs for Preparation of Clerk's and Reporter's Transcripts on Appeal. After briefing and oral argument, petitioner's motion was denied on April 1, 1966. Petitioner's attorneys withdrew from the case shortly thereafter. On June 10, 1966, petitioner moved the District Court of Appeal, Second Appellate District, in propria persona, for an Order of Waiver of Prepayment of Clerk's and Reporter's Transcripts on Appeal. Said motion was denied by the court on June 20, 1966. Petitioner thereafter, on July 1, 1966, petitioned the California Supreme Court for a hearing; said petition was denied August 17, 1966. Petitioner did not seek review of that order by this Court.

On October 18, 1966, respondents noticed a Motion to Dismiss Appeal in the District Court of Appeal. On November 16, 1966, petitioner filed a brief in opposition to respondents' Motion to Dismiss and applied for relief from his default in failing to comply with the rules of court setting forth procedures for payment of the cost of the clerk's and reporter's transcripts. At the same time he offered to pay for both transcripts within five days. On November 22, 1966, the District Court of Appeal,

after hearing arguments on both matters, denied petitioner's application for relief from default and granted respondents' Motion to Dismiss Appeal. On January 4, 1967, petitioner petitioned the California Supreme Court for a hearing with respect to the dismissal of his appeal; said petition was denied on January 20, 1967.

Argument

I. DISMISSAL OF PETITIONER'S APPEAL WAS ENTIRELY PROPER AND RAISES NO FEDERAL QUESTION.

In the court below, petitioner's appeal was dismissed because of his failure to make timely arrangements for payment of applicable costs. Petitioner does not argue, nor could he, that the provisions of the California Rules of Court authorizing dismissal in such instances are unconstitutional, and this case therefore does not present any question of federal law. Moreover, the dismissal of petitioner's appeal was clearly correct.

Under Rules 4(c) and 5(c) of the California Rules of Court, which are printed in Appendix A hereto (pp. 11-12, 15), a notice of appeal is ineffective for any purpose unless within ten days after notice from the clerk of the estimated costs of preparing the reporter's and clerk's transcripts, appellant makes arrangement for the payment thereof. Rule 10(a) of the California Rules of Court, paralleling Rule 73(a) of the Federal Rules of Civil Procedure, provides in part:

> "If the appellant shall fail to perform any act necessary to procure the filing of the record or to pay the filing fee within the time allowed therefor

or within any valid extension of that time, and such failure is the fault of the appellant and not of any court officer or of any other party, the appeal may be dismissed on motion of the respondent or on the reviewing court's own motion."

Petitioner was notified of the cost of the clerk's transcript on March 9, 1966, and of the cost of the reporter's transcript on March 14, 1966. From March 14, 1966 to November 16, 1966, a period of over eight months, he did not pay these costs or offer to do so. Rather, throughout this time he sought to have the State pay for his appeal. Petitioner met defeat on every step of the judicial ladder, based upon a long line of California cases which rule plainly and uniformly that there is no legal mode of requiring payment for a civil appeal out of the public treasury. See, e.g., *Agnew v. Contractor's Safety Association,* 216 Cal.App.2d 154, 156, 30 Cal.Rptr. 690, 691 (2nd Dist. 1963), hearing denied by the California Supreme Court July 10, 1963, cert. denied, 375 U.S. 976 (1964); *Rucker v. Superior Court,* 104 Cal. App. 683, 286 P. 732 (2nd Dist. 1930).

Furthermore, at no time during the pendency of his appeal did petitioner sufficiently establish that he was truly without funds, nor adequately show what efforts he had made to raise the sum which would enable him to comply with the rules. See, e.g., Application for Relief from Default in the District Court of Appeal, item No. 2 in the record filed herein by petitioner. This case thus is quite different from *Jeffers v. Screen Extras Guild,* 140 Cal.App.2d 604 (1956), cited by petitioner (p. 5). In *Jeffers,* in justification of his delay in making payment appellant showed in great detail his diligent efforts to

obtain funds for the transcripts. Petitioner made no such showing and utterly failed to establish the good cause required under California Rule of Court 45(e) for relief from default. The court below was undoubtedly influenced in this regard by the fact that no explanation of any kind accompanied petitioner's sudden offer to pay for the transcripts just as the appeal was about to be dismissed. (See Petition for Writ of Certiorari, p. 3) The circumstances of this last minute gesture naturally made highly suspect petitioner's earlier claims of indigence.

II. PETITIONER'S CONSTITUTIONAL ARGUMENT IS NOT TIMELY RAISED AND IS, IN ANY EVENT, WITHOUT MERIT.

Petitioner also argues that California deprived him of a constitutional right by refusing to pay for the record on appeal. This point, however, is not timely raised by the present petition seeking review of the dismissal of petitioner's appeal for non-compliance with the rules of court. The constitutional argument might properly have been urged on the original motion to be exempted from payment of costs on appeal. In fact, no such issue was set up by petitioner in his motion to the trial court, except as might be inferred from his citation without comment of *Griffin v. Illinois*, 351 U.S. 12 (1956). Upon renewing this motion in the District Court of Appeal, petitioner made no mention, by inference or otherwise, of any claimed federal right. Finally, in appealing to the California Supreme Court from the order denying the motion, petitioner for the first time made express reference to the Fourteenth Amendment. But in thus appealing,

petitioner chose the wrong avenue of review. No appeal lies from such an order, *Agnew v. Contractors' Safety Assn., supra,* and the California Supreme Court on August 16, 1966 denied the petition for a hearing. Rather, assuming *arguendo* that petitioner had not already waived his constitutional point by failing to present it distinctly in the first instance, his remedy at that juncture was to seek a writ of mandate to compel the trial court to allow him to perfect his appeal *in forma pauperis.* See *Kaufman v. Brown,* 106 Cal.App. 2d 686, 689, 235 P.2d 632, 634 (1951); *Rucker v. Superior Court, supra;* 3 Witkin, California Procedure 2533. Mandamus proceedings were not initiated, however, and petitioner should not be heard to assert Fourteenth Amendment issues at this late date.

In any event, petitioner's constitutional argument is wholly without merit. Reliance is placed on *Griffin v. Illinois,* 351 U.S. 12 (1956). That decision is inapplicable here, however, and not only for the obvious reason that *Griffin* was a criminal action involving radically different considerations of public policy and constitutional doctrine. *Griffin* is factually dissimilar to the present suit in two additional material respects. In that case, the state conceded that petitioners were indigent and that there were substantial errors in the trial court which would have entitled petitioners to a reversal. 351 U.S. at 13, 15. Here, petitioner has never made an adequate showing of actual indigence or of his attempts to obtain funds, and that failure stands as an independent basis for the decision below. Moreover, respondents definitely do not concede that any errors were made in the trial court. Indeed, a review of the Findings of Fact

and Conclusions of Law, printed in Appendix B hereto (pp. 26-29), shows that judgment in the instant case was based largely upon matters within the trial court's discretion and that reversible error is manifestly improbable. Withdrawal of petitioner's attorneys who tried the case further attests to the want of merit in the appeal. (See Petition for Writ of Certiorari, p. 2.)

It should be emphasized finally that in *Griffin* this Court did not hold that Illinois must always provide a stenographer's transcript where a defendant cannot buy it, even in criminal cases. In this regard, the Court ruled:

> "The Supreme Court [of Illinois] may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases."
>
> 351 U.S. at 20.

Former provisions dealing with bills of exceptions in California have been effectively superseded by Rule 7 of the California Rules of Court, printed in Appendix A hereto (pp. 18-20), which provides that an appellant may appeal in any case by a settled statement in lieu of both a reporter's and a clerk's transcript. See 3 Witkin, California Procedure 2319-24. Provision is made for filing by appellant of "a condensed statement in narrative form of all or such portions of the oral proceedings as he deems material to the determination of the points on appeal." Respondent may propose amendments thereto and the judge who tried the case, on noticed hearing, settles any differences between the parties. See *Estate of Wolper*,

146 Cal. App.2d 249, 303 P.2d 578 (1956). California has thus provided adequate and effective alternative means for appellate review of civil cases, a procedure available to petitioner, though rejected by him.

Conclusion

For the foregoing reasons, respondents respectfully urge that the Petition for Writ of Certiorari herein be denied.

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Appendix A

CALIFORNIA RULES OF COURT
Nos. 4, 5, 7, 10 and 45

APPELLATE RULES

Rule 4. Reporter's Transcript

(a) (Notice to prepare transcript) When an appellant desires to present any point which requires a consideration of the oral proceedings or the instructions given by the court, whether written or oral, or any instructions requested but refused by the court, he shall serve on the respondent and file with the clerk of the superior court, within 10 days after filing of the notice on appeal, a notice to prepare a reporter's transcript of the oral proceedings and such oral or written instructions given or refused, as he shall desire copied or transcribed.

A copy of this notice shall be transmitted by the clerk without delay to the reporter who shall within 10 days thereafter file his estimate with the clerk or notify the clerk in writing of the date that he notified the appellant directly of the estimated cost of preparing the reporter's transcript on appeal. The **voir dire** examination of jurors, the opening statements, the arguments to the jury, and the proceedings on a motion for new trial shall not be transcribed as part of the oral proceedings unless they are specified in the notice to the clerk. The oral proceedings shall include such portions of depositions as have been received in evidence and such portions thereof as shall have been offered and rejected. The portions

rejected and the objections thereto shall be clearly indicated.

(b) [Partial transcript by stipulation or designation] The parties, by stipulation filed with the clerk of the superior court within the time prescribed for filing the notice to prepare a reporter's transcript, may direct that any part of the oral proceedings be not transcribed. If the appellant, in his notice to the clerk, states the points to be raised by him on the appeal, he may designate the portions of the oral proceedings to be transcribed, or direct the omission of any portions which he deems unnecessary, and in such event shall be precluded from presenting any grounds for reversal not embraced within the points stated by him, unless the reviewing court on motion shall permit the appellant to present additional errors or grounds of appeal on such terms as it may prescribe. Within 10 days after the service of the appellant's notice to prepare the reporter's transcript pursuant to this rule, or to prepare the clerk's transcript pursuant to subdivision (a) of rule 5, the respondent may serve and file a notice designating the oral proceedings and instructions either given or refused, not designated in the appellant's notice, which he desires transcribed. Only those portions of the oral proceedings and instructions designated in the notices of the parties shall be transcribed; provided, however, that if any portion of the testimony of a witness is designated by either party for inclusion in the reporter's transcript, the whole of his testimony shall be included unless the parties otherwise stipulate.

(c) (Deposit or waiver of reporter's charges) The notice given by the appellant under the foregoing provi-

sions of this rule shall not be effective for any purpose unless, within 10 days after notification from the clerk of his estimate of the cost of preparing the reporter's transcript as designated by the notice of the parties, or within 10 days after being notified directly by the reporter, the appellant shall either deposit with the clerk an amount of cash equal to the estimated cost with directions to apply the same to the fees of the reporter or file with the clerk a waiver of such deposit signed by the reporter. When the appellant has complied with the provisions hereof, the clerk shall forthwith direct the reporter to prepare the reporter's transcript in accordance with the notices of the parties.

(d) (Preparation of transcript) Within 30 days after direction from the clerk or the receipt of the fees from the appellant the reporter shall complete and file with the clerk an original and one copy of the reporter's transcript as directed, and certify the same as correct. The reporter shall note in the transcript all places where omissions of any oral proceedings occur (and the nature of the omitted matter) and shall also indicate the place where exhibits were received in evidence or were offered and marked for identification, and shall identify the exhibits so received or so offered. When oral or written instructions given or refused are included, the transcript shall indicate for each instruction (1) the party requesting it or that it was given on the court's own motion, (2) the number assigned to it by the court or if none, the number assigned by the party requesting it, (3) whether it was given or refused, (4) any reason for refusal endorsed by the court on the instruction, and (5) what

modifications, if any, were made by the court in giving a requested instruction. The reporter shall not transcribe or copy in the reporter's transcript any document which under the provisions of rule 5, may be included in the clerk's transcript on appeal.

(e) (Settled statement where transcript unavailable) If, without fault of the appellant, the reporter refuses or becomes unable or fails to transcribe all or any portion of the oral proceedings designated by the parties, the clerk shall mail notices to the parties specifying the portions of the oral proceedings which the reporter refuses, is unable, or fails to transcribe. At any time prior to the expiration of 10 days after mailing of such notice, the appellant may serve and file a notice of motion for leave to prepare a settled statement of such portions of the oral proceedings. If the superior court grants the motion, the statement shall be served, filed and settled in the manner provided for by Rule 7, except that the time for the serving, filing and settling thereof shall be that fixed by the court in the order granting the motion. If the settled statement contains all the oral proceedings, it shall become a part of the record on appeal in lieu of the reporter's transcript, but if it contains only a portion of the oral proceedings, it shall be incorporated in the reporter's transcript. This remedy is in addition to any remedy given by law.

Rule 5. Clerk's Transcript and Original Papers

(a) (Appellant's designation of papers or records) Within 10 days after filing the notice of appeal, the appellant shall serve on the respondent and file with the

clerk of the superior court a notice designating the papers or records on file or lodged with the clerk, including the clerk's minutes and any written opinion of the superior court and exhibits either admitted in evidence or rejected, which he desires incorporated in the record on appeal. If in said notice the appellant shall designate any exhibit admitted in evidence or rejected, or any affidavit, he shall specify such of them as he desires copied in the clerk's transcript. The notice designating papers and records and the notice to prepare the reporter's transcript may be included in the same document, and both notices may be included in the document containing the notice of appeal.

(b) (Designation by respondent or by stipulation) Within 10 days after service of the appellant's notice, the respondent may serve on the appellant and file with the clerk a notice designating additional papers or records, including the clerk's minutes, any written opinion of the superior court, and exhibits either admitted in evidence or rejected, to be included in the record on appeal, and specifying such exhibits and affidavits as he desires copied in the clerk's transcript. The respondent, in his notice of designation, may elect to furnish the clerk with copies of such exhibits or affidavits instead of having them copied by the clerk, in which case he shall furnish an original typewritten copy and a first carbon thereof, in conformity with rule 9(a), within 10 days after filing his notice of designation, otherwise they shall not be included. If the respondent directs that any exhibits or affidavits be copied, he shall, within 10 days after notification from the clerk of his estimate of the

costs, make arrangements with the clerk to pay the cost thereof; otherwise they shall not be copied. In lieu of such individual notices the parties, within 10 days after the filing of the notice of appeal, may file a written stipulation designating the papers or records to be included in the record on appeal.

(c) (Clerk's charges) The notice given by the appellant under the foregoing provisions of this rule shall not be effective for any purpose unless, within 10 days after notification from the clerk of his estimate of the cost of preparing the transcript, with the exception of exhibits and affidavits which the respondent has directed to be copied, the appellant shall make arrangements with the clerk for the payment thereof.

(d) (Preparation of clerk's transcript) Within 30 days after the appellant has arranged for payment of the cost of the transcript, as provided in subdivision (c) of this rule, the clerk shall prepare an original and one copy of a transcript, and certify the original, consisting of:

The following whether designated in the notices of the parties or not: (1) the notice of appeal; (2) the notices or stipulations to prepare the clerk's transcript and the reporter's transcript, if any, and the notices or stipulations for the preparation of a settled statement or agreed statement, if any; (3) the pretrial order, if any, whenever the judgment roll or any part thereof has been designated by the parties; (4) any notice of intention to move for a new trial or motion to vacate the judgment, and the ruling thereon, if any.

The following, if they have been designated by any of the parties; (5) the judgment roll, or such parts thereof as have been designated by the parties; (6) any other papers or records (other than exhibits admitted in evidence or rejected, affidavits and instructions) on file or lodged with the clerk; (7) such exhibits admitted in evidence or rejected and affidavits as the parties have directed to be copied.

The appellant may elect in his notice of designation to furnish the clerk with copies of all or of specified parts of the matters which he has designated. If he desires to furnish copies of any of the papers and records designated by respondent, he shall, within five days after service of respondent's notice of designation, file with the clerk a notice specifying which papers he will furnish and which are to be copied by the clerk. All copies of papers designated by appellant shall be deposited with the clerk within 10 days after the filing of appellant's designation, and all copies of papers designated by respondent shall be deposited with the clerk within 10 days after service of respondent's designation. All copies so furnished shall conform to subdivision (a) of rule 9, and, except where the appellant furnishes legible copies produced by other process of duplication as defined in subdivision (1) of rule 40, one of the copies of the papers shall be an original typewritten copy and the other shall be a first carbon thereof. If appellant shall fail to deposit copies of all designated papers within the times herein specified, the clerk shall immediately give notice of the cost of copying all papers not deposited, and appellant's notice of designation shall not be effective for any purpose unless, within

10 days after such notification, he shall make arrangements with the clerk for payment of such cost.

(e) (Matters not to be copied) Captions and formal parts of papers copied **and verifications and proofs of service of such papers** shall be omitted unless one of the parties expressly requests their inclusion, **but the clerk shall state in his transcript the nature of such omitted matters.** No exhibit admitted in evidence or rejected or affidavit shall be copied if it is possible for the clerk to transmit the original to the reviewing court unless copying is directed by the notice of one of the parties, nor shall any such exhibit or affidavit be copied by the clerk at the request of the respondent unless the respondent shall have made arrangements with the clerk for the payment of the cost thereof as provided in subdivision (b) of this rule. In no event shall the clerk copy in his transcript or transmit to the reviewing court (except by order of that court or stipulation of the parties) the original of any deposition or any oral or written instructions given or refused.

(f) (Appeal on judgment roll) Where the appellant has designated only a clerk's transcript consisting of part or all of the matters specified in subdivisions (a) and (b) of rule 5 and has not given notice to prepare a reporter's transcript, the respondent may not require the preparation of a reporter's transcript but he may counter-designate any exhibits, affidavits, papers or records, other than instructions, which may properly be included in a clerk's transcript. Where the appellant has designated only the papers and records constituting the judgment roll and has not given notice to prepare a reporter's tran-

script, the judgment roll and the pretrial order, if any, shall constitute the record on appeal, and the respondent may not require any addition thereto. In either case, however, the reviewing court on motion of the respondent or its own motion may order augmentation of the record whenever it is necessary to prevent a miscarriage of justice.

Rule 7. Settled Statement

(a) (Proposal of narrative statement) If, in lieu of a reporter's transcript, the appellant desires to set forth the oral proceedings by a settled statement, he shall serve and file a notice so stating within 10 days after filing the notice of appeal. Within 30 days thereafter the appellant shall serve and file a condensed statement in narrative form of all or such portions of the oral proceedings as he deems material to the determination of the points on appeal. Where necessary for the purpose of accuracy, clarity or convenience, portions of the evidence may be set forth by question and answer, subject to the approval of the court in settling the statement. If the condensed statement purports to cover only a portion of the oral proceedings, the appellant shall state the points to be raised by him on appeal, and in such event shall be precluded from presenting any grounds for reversal not embraced within the points stated by him unless the reviewing court, on motion, shall permit him to present additional errors or grounds of appeal on such terms as it may prescribe. Within 20 days after service of said narrative statement the respondent may serve and file his proposed amendments thereto. The appellant in his condensed statement and the respondent in his pro-

posed amendments may incorporate any instructions given or refused which such party deems material.

(b) (Settled statement in lieu of both transcripts) If, in lieu of both a reporter's and clerk's transcript, the appellant desires to present his appeal wholly on a settled statement, he shall serve and file a notice so stating within 10 days after filing the notice of appeal and, in that event, the provisions of subdivision (a) of rule 7 shall be applicable. The appellant's proposed statement shall contain in addition to the condensed statement of the oral proceedings copies of the following: (1) the judgment roll or such portions thereof as are deemed material to a determination of the points on appeal, and if there is no judgment roll, the judgment appealed from; (2) the notice of appeal; (3) the notice to the clerk of election to proceed by a settled statement; (4) the pretrial order, if any, whenever the statement contains a copy of the judgment roll or any part thereof; and (5) any notice of intention to move for a new trial or motion to vacate the judgment, the ruling thereon, if any, and a recital or resume of any oral proceedings thereon. The appellant's proposed statement, and the respondent's proposed amendments, may include any other papers or records which either party might have had incorporated in the clerk's transcript, under the provisions of rule 5. Both the statement and the proposed amendments may be accompanied by a list of such exhibits admitted in evidence or rejected or affidavits as the party desires to have transmitted as originals.

(c) (Appellant's transcript available to respondent) If the appellant has prepared his proposed statement from

an entire or partial transcript of the oral proceedings, and after service of his proposed statement declines to make such transcript available to the respondent, the superior court, on such terms and conditions as it deems just, may direct the appellant to make his copy of the transcript available to the respondent. If the appellant fails to comply with such direction, the court on motion of the respondent shall strike the proposed statement from the files.

(d) (Settlement and engrossment) On the filing by the respondent of his proposed amendments or on the expiration of the time therefor (whichever shall first occur), the clerk shall set a time not more than 10 days thereafter for settlement of the statement by the judge who tried the case, and shall give not less than 5 days' notice to all parties of the time set. At the time set, or at the time to which the judge may continue the hearing, he shall settle the statement and fix the time within which the appellant shall engross it as settled. Within the time so fixed the appellant shall engross the statement in accordance with the order of the judge and shall serve and file the engrossed statement. If the respondent does not serve and file objections to the engrossed statement within five days thereafter, it shall be presumed that it is engrossed in accordance with the order of the judge and shall be presented by the clerk to the judge for certification. If the parties stipulate that the statement as originally served or as engrossed is correct, such stipulation shall have the same effect as certification thereof by the judge.

Rule 10. Transmission and Filing of Record

(a) (Filing and payment of fee) When the record on appeal has been completed in accordance with these rules the clerk shall forthwith transmit any original transcripts or agreed or settled statements to the reviewing court. When these are received the clerk of the reviewing court shall notify the appellant that the filing fee shall be paid within 20 days from the date of mailing of such notice, and on such payment the record shall be filed. After the expiration of such 20-day period the clerk shall not permit the filing of the record except by the direction of the Chief Justice or Presiding Justice. If the appellant shall fail to perform any act necessary to procure the filing of the record or to pay the filing fee within the time allowed therefor or within any valid extension of that time, and such failure is the fault of the appellant and not of any court officer or any other party, the appeal may be dismissed on motion of the respondent or on the reviewing court's own motion.

(b) [Transmission of exhibits] When the parties shall have been notified by the clerk of the reviewing court that an appeal has been set for hearing, each party shall file with the clerk of the superior court a notice specifying such of the original exhibits or affidavits designated by any party for inclusion in the record, as he desires transmitted to the reviewing court, and the clerk shall immediately transmit them to the reviewing court. The clerk of the superior court shall arrange and list them, and two duplicates of such list shall be forwarded with them. If the list is found correct, one duplicate shall be signed by the clerk of the reviewing court and returned to the clerk of the superior court. If any papers are illegible or

otherwise unusable, the reviewing court may require that copies be made and filed. The reviewing court at any time may order that any original exhibits or affidavits designated by the parties as a part of the record be transmitted to it by the clerk of the superior court. The reviewing court on application may order that original exhibits or affidavits be sent to the superior court for use in any other proceeding, and on the issuance of the remittitur, they shall be returned to the superior court.

(c) (Use of copies) The additional copy of the record required by these rules shall be made available for the use of the parties to the appeal in such manner as the judge, or the clerk under his direction, shall prescribe; provided that the parties may stipulate to its use, and in such event only the original need be filed with the clerk of the superior court.

Rule 45. Extension and Shortening of Time

(a) [Computation of time] The time for doing any act required or permitted under these rules shall be computed and extended in the manner provided by the Code of Civil Procedure.

(b) [Extension by superior court] The superior court, for good cause shown, may extend the time for doing any act involved in the preparation of the record on appeal in a civil case, prior to the expiration of such time or any valid extension thereof; provided, however, that the time specified for payment of the fee for filing the record in the reviewing court may not be extended by the superior court. Such extensions granted to any party shall not exceed 90 days in the aggregate, and no single extension shall be for a period in excess of 30 days. Anything in

these rules to the contrary notwithstanding, the initial extension granted to any party by the superior court may be granted ex parte.

(c) [Extension of time] The time for filing a notice of appeal or the granting or denial of a rehearing in the Court of Appeal shall not be extended. The time for the granting or denial of a hearing in the Supreme Court after decision by a Court of Appeal shall only be extended as provided in subdivision (a) of rule 28. The time for the granting or denial of a hearing in the Supreme Court shall only be extended as provided in subdivision (a) of rule 24.* The Chief Justice or Presiding Justice, for good cause shown, may extend the time for doing any other act required or permitted under these rules and may relieve a party from a default for failure to file a timely petition for hearing or rehearing or an answer thereto if the time within which the court must act on the petition has not expired. An application for extension of time shall be made as provided in rule 43.

(d) [Shortening time] The Chief Justice or Presiding Justice, for good cause shown, may shorten the time for serving or filing a notice of motion or other paper incident to an appeal or an original proceeding in the reviewing court. An application to shorten time shall be made as provided in rule 43.

(e) [Relief from default] The reviewing court for good causes may relieve a party from a default occasioned by any failure to comply with these rules, except the failure to give timely notice of appeal. This rule is applicable to any order granting relief from default made after January 1, 1962.

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* See rule 27.

Appendix B

MEMORANDUM OPINION AND AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

EDDIE ROCCO,
Plaintiff,
vs.
LIFE MAGAZINE, TIME, INCORPORATED, MIKE DURHAM, and DOE I to DOE XL, INCLUSIVE,
Defendants.

No. 832 002
MEMORANDUM OPINION

From the evidence, the Court determines that under the Sales Agreement (Exhibit 1) between the plaintiff and defendant LIFE Magazine, plaintiff sold all of his right, title and interest in the photographs, together with the contents of an interview, to the said purchaser, defendant LIFE Magazine, free and clear of any reservation of title or interest by or in the plaintiff. That the term "photographs" used therein, included the original negatives, and that such was the intent of the parties.

The second paragraph of the Agreement in the first sentence sets forth an absolute sale for a fixed price. The second sentence states, "This sale gives to LIFE Magazine all world magazine rights to above described photographs", which it did, and the sentence is but a recognition of a right encompassed in the titles acquired under

the first sentence, is superfluous and not repugnant to the main purpose of the paragraph and of the Agreement as a whole. The Court cannot, under guise of interpretation, write an agreement for the parties, nor can it insert or delete words therefrom.

Judgment is ordered for defendant as to all and each of plaintiff's causes of action. Counsel for defendants to prepare Findings of Fact, Conclusions of Law and Judgment in line with the foregoing within ten days from date; copies to be served upon counsel for plaintiff.

DATED: October 26, 1965.

/s/ JAMES M. MCROBERTS
Judge

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Attorneys for Defendants
TIME, INCORPORATED and
MIKE DURHAM

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

EDDIE ROCCO, *Plaintiff,* *vs.* LIFE MAGAZINE, et al., *Defendants.*	No. 832,002 ~~PROPOSED~~ AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for non-jury trial on October 5, 1965, in Department 32 of the above-entitled court, the Honorable James M. McRoberts, Judge presiding, plaintiff and defendants being represented by their respective attorneys of record, whereupon evidence, both oral and documentary, was introduced and the cause argued and submitted for decision;

WHEREFORE, the court being fully advised in the premises, now renders its decision as follows:

Findings of Fact

1. On November 25, 1963, plaintiff and defendant Time, Incorporated, through its duly authorized agent

defendant Mike Durham, made and entered into an agreement in writing, received as Exhibit 1 herein.

2. Defendant Time, Incorporated has paid to plaintiff the sum of $2,500 pursuant to the terms of said agreement.

3. In executing the sales agreement received as Exhibit 1, plaintiff intended to sell and defendant Mike Durham on behalf of defendant Time, Incorporated, intended to purchase all of plaintiff's right, title and interest in and to the photographs which were the subject matter of the sale, together with the contents of plaintiff's interview with Jack Rubenstein, free and clear of any reservation of right, title or interest by or in the plaintiff.

4. The term "photographs" as used in said sales agreement was intended by the parties to include the original negatives and all photographic images, both positive and negative, which may be produced therefrom.

5. Plaintiff delivered to defendant Mike Durham eight (8) rolls only of unprocessed film.

6. Neither defendant Mike Durham, nor any other representative of defendant Time, Incorporated, at any time agreed, promised or represented to plaintiff that LIFE Magazine would return to plaintiff the original negatives of the photographs which were the subject matter of the sale.

7. According to the custom and practice of defendant Time, Incorporated, and other magazines, where negatives are delivered to the purchaser of news or general

interest photographs, the negatives become the property of the customer in the absence of a specific agreement to return them to the photographer, which agreement is normally set forth in a written contract of sale or invoice.

8. No false or fraudulent statements were made by defendants, or either of them, to plaintiff.

9. The Court finds in all respects, as set forth in the Conclusions of Law following these Findings of Fact.

Conclusions of Law

The Court concludes:

1. In all respects as set forth in the foregoing Findings of Fact.

2. That under the sales agreement received as Exhibit 1 between plaintiff and defendant Time, Incorporated, plaintiff sold all of his right, title and interest in and to the photographs which were the subject matter of the sale, together with the contents of his interview with Jack Rubenstein, to defendant Time, Incorporated, free and clear of any reservation of right, title or interest by or in the plaintiff.

3. That the rights sold by plaintiff under said sales agreement included world magazine rights, but were not limited thereto.

4. That the term "photographs" as used in said sales agreement includes the original negatives and all photographic images, both positive and negative, which may be produced therefrom.

5. That defendant Time, Incorporated, is absolute owner of said original negatives and plaintiff has no further rights in the same.

6. That according to the custom and practice of defendant Time, Incorporated, and other magazines, where negatives are delivered to the purchaser of news or general interest photographs, the negatives become the property of the customer in the absence of a specific agreement to return them to the photographer, which agreement is normally set forth in a written contract of sale or invoice.

7. That defendants have not breached said sales agreement between the parties.

8. That defendant Time, Incorporated, is entitled to possession of said original negatives.

9. That defendants have not converted any property of plaintiff.

10. That defendants have not defrauded plaintiff.

11. That defendants, and both of them, are entitled to judgment, as to each and all of plaintiff's causes of action, that plaintiff take nothing and that defendants recover their costs incurred herein.

Let judgment be entered accordingly.

DATED: This 13th day of January, 1966.

/s/ JAMES M. MCROBERTS
Judge